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May 17, 2000

**VIA HAND DELIVERY**

Ms. Magalie R. Salas  
Secretary  
Federal Communications Commission  
Portals II, Filing Center, TW-A325  
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Washington, D.C. 20554

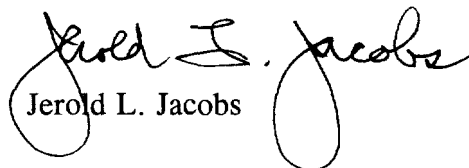
Re: DTV Conversion Review  
MM Docket Nos. 00-39

Dear Ms. Salas

On behalf of Mike Simons, licensee of Station KTAQ(TV), Greenville, Texas, transmitted herewith are an original and four (4) copies of his Comments in the above-captioned rulemaking proceeding.

If you have any questions concerning the Comments, please direct them to the undersigned.

Very truly yours

  
Jerold L. Jacobs

Enclosure

cc: Ms. Wanda Hardy (w/diskette)  
International Transcription Service (w/diskette)  
Keith A. Larson, FCC, MMB, 2-C420  
Gordon W. Godfrey, FCC, MMB, 2-C120

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BEFORE THE  
**Federal Communications Commission**

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MAY 17 2000  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Review of the Commission's ) MM Docket No. 00-39  
Rules and Policies )  
Affecting the Conversion )  
To Digital Television )  
  
To: The Commission

**COMMENTS OF MIKE SIMONS**

MIKE SIMONS ("Simons"), licensee of Station KTAQ(TV), Greenville, Texas, by his attorneys, pursuant to §1.415 of the Commission's Rules, hereby submits his Comments on Paragraphs 16-26 ("*Replication*") of the Notice of Proposed Rule Making ("NPRM"), FCC 00-83, released March 8, 2000, in the above-captioned matter.

**I. Introduction**

1. Station KTAQ has pending a non-"checklist" DTV implementation application for its allotted DTV Channel 46, which: (a) is fully consistent with Sections 73.622 and 73.623 of the Rules; and (b) proposes to relocate KTAQ's transmitter site in such a way that KTAQ's DTV service area would be extended beyond its NTSC replicated area. In the *Replication* section of the NPRM, at Paragraphs 16-26, the Commission expresses anguish over the fact that the "lack of an explicit replication requirement and a city-grade service requirement [in the current DTV rules] may encourage some licensees to locate their proposed DTV facilities at a substantial distance from their NTSC facilities and their communities of license". Id. at ¶17.

According to the Commission, “This may have negative consequences for the transition to digital television”. Id.

2. As articulated in Paragraph 20 of the NPRM, the Commission’s concerns are threefold. First, locating stations’ DTV facilities far from their NTSC facilities is at odds with the Commission’s professed “expectation” that licensees would replicate their NTSC facilities. Second, if such stations remain on their DTV channels at the end of the transition, people within the NTSC service areas but outside of the DTV service areas presumably will lose service. Third, a large scale move of DTV stations into larger urban markets might pose a problem under Section 307(b) of the Communications Act of 1934, as amended (“the Act”), 47 U.S.C. §307(b), because it might represent a *de facto* reallocation from smaller, more rural and underserved areas to larger well-served urban areas and might undermine the Commission’s allotment decisions in the DTV Table of Allotments.

3. In these Comments, Simons urges that the Commission should not adopt a replication requirement. Such a requirement would undermine the historical right and creative spirit of broadcast licensees during the last 65 years under the Act to maximize use of their authorized portion of the electromagnetic spectrum, consistent with the Commission’s Rules, according to their best judgment and discretion. In recent years, the Commission has increasingly recognized the public interest value in allowing broadcasters to have freer rein in making decisions affecting station operations and service area, such as by relaxing the main studio location rule in Report and Order in MM Docket No. 97-138, 13 FCC Rcd 15691 (1998). Consistent with that enlightened regulatory approach and as explained in the following Comments, Simons maintains that the Commission should allow DTV licensees to vary their DTV service areas from their NTSC service areas, so long as the Commission’s technical rules

are met. The Commission is eager for DTV operations to thrive. It therefore should allow DTV licensees to maximize their creativity to accomplish that end. Saddling them with a generic requirement to replicate their old NTSC service areas, without regard to local competitive impact and other business and public interest considerations, would be counterproductive and contrary to sound public policy.

## **II. DTV/NTSC Replication is not Required by the Act And Should Not be Added by Commission Rule**

4. The Commission's DTV allotment investigations began in 1987. See Notice of Inquiry in MM Docket No. 87-268, 2 FCC Rcd 5125 (1987). A brief review of key Commission replication policy pronouncements between 1987 and today forms an important starting point for Simons' Comments.

5. It was not until the Second Further Notice of Proposed Rule Making in MM Docket No. 87-268, 7 FCC Rcd 5376 (1992), that the Commission really began to focus on the concept of a "service replication/maximization" plan as the preferred DTV allotment approach. Under that plan, the Commission would "attempt to provide ATV [DTV] coverage areas comparable to existing NTSC coverage areas," as proposed by the Commission's Advisory Committee on Advanced Television Service. Id. at 5378 ¶12. In so doing, the Commission emphasized its concern that the service replication/maximization objective might not be attainable and that it was "likely that a significant number of cases would be encountered in which an acceptable degree of service replication could not be obtained and that all licensees might not be satisfied with the allotments and assignments the plan would produce". Id. at 5379 ¶14. Thus, it is clear that, at this formative point in the Commission's replication thinking, it viewed the goal of DTV replication of stations' NTSC service areas primarily as a means of

gaining station support for the DTV transition concept. There was no discussion of mandatory replication.

6. Likewise, in the Sixth Further Notice of Proposed Rule Making in MM Docket No. 87-268, 11 FCC Rcd 10968, 10974-75 ¶13 (1996), the Commission agreed that “replication of existing service areas...offers important benefits for both viewers and stations...[because it] would generally maintain the service areas of existing NTSC stations, thereby preserving viewers’ access to off-the-air TV service and the ability of stations to reach the audiences that they now serve....Furthermore...we are proposing to allow stations to maximize or increase their service area where such an increase would not create additional interference.” Importantly, the Commission continued to portray replication as a “benefit” to stations and even offered the further incentive that stations might actually be able to “increase their service area” beyond replication via “maximization”. Again, there was no discussion about mandatory replication.

7. Finally, in the Sixth Report and Order in MM Docket No. 87-268, 12 FCC Rcd 14588, 14605 ¶29 (1997), the Commission officially adopted the “service replication/maximization” concept for implementing DTV, and reiterated that “providing DTV allotments that replicate the service areas of existing stations offers important benefits for both viewer and broadcasters”. Most importantly, the Commission stated that “it is important to adopt an approach that provides for a high degree of service replication by all stations, while at the same time ensuring that all stations are able to provide DTV service competitively within their respective markets” (emphasis added). *Id.* at 14605 ¶30. The Commission also adopted rules allowing stations to maximize their facilities and service areas beyond what was specified in the DTV Table of Allotments by filing non-“checklist” implementation applications consistent with the DTV technical rules. Simons duly filed such a non-“checklist” application.

8. Simons urges that several important principles can be drawn from the preceding history of the Commission's development of a DTV replication policy. First, and foremost, the concept of replication is not grounded in the Act or in any other Congressional mandate, but is strictly a Commission-developed policy. Second, up until the subject NPRM, the replication policy had been uniformly treated by the Commission as a "shield" to protect broadcasters against unintended loss of service area in the DTV transition -- not as a "sword" forcing broadcasters to limit their DTV service area to the "footprint" of their NTSC service. Lastly, in the Sixth Further Notice, supra, the Commission proudly unveiled a plan to allow DTV licensees to "maximize" their facilities beyond replication, and in the Sixth Report and Order, the Commission codified this concept in its technical rules and permitted the filing of non-"checklist" applications. In Station KTAQ's case, its application is fully consistent with Sections 73.622 and 73.623 of the Rules but relocates KTAQ's transmitter so that its DTV service area includes KTAQ's community of license but is different from its NTSC service area.

9. Given this rulemaking history, the Commission should not be surprised that broadcasters have interpreted previous replication pronouncements as fully compatible with their historical freedom to use their best business, economic, and public interest judgments to maximize their authorized facilities, consistent with the Commission's rules and policies. Thus, neither the Commission's rules nor its rulemaking statements provided any notice that the Commission "expected" licensees to limit their DTV operations to mere replication of their NTSC service areas or necessarily to include their entire NTSC service area in any proposed increased DTV service area. To the contrary, the above-quoted language in the various DTV rulemaking orders clearly attempted to placate broadcasters' concerns about the DTV transition

and to emphasize their ability to compete in the DTV market place using their best judgment, which included maximizing their facilities beyond, and apart from, their NTSC service areas.

10. Under these circumstances, Simons submits that it is inequitable and without foundation in law or policy for the Commission to re-interpret its replication policy during the subject “first periodic review” of DTV conversion with the effect of outlawing certain pending DTV implementation applications, like Station KTAQ’s, which do not fully replicate their NTSC service areas but do increase their DTV service areas beyond their NTSC service areas. When Simons (and others) filed their non-“checklist” DTV implementation applications, which are fully consistent with the Commission’s interference-based DTV technical rules, they were not on notice that such applications were contrary to any (unstated) Commission policy. Hence, if the Commission decides in this proceeding to change its replication policy and to require full NTSC service area replication, Simons maintains that it would be contrary to sound public policy and administrative due process to apply such a change retroactively to already-pending applications, like KTAQ’s, which are otherwise fully consistent with the Commission’s DTV rules. At most, any such rule change should be applied only prospectively to future-filed DTV maximization applications, and pending applications should be “grandfathered”.

### **III. The Commission Should Not Apply Discredited or Irrelevant Section 307(b) Policy Mechanisms to DTV Applications**

11. Simons further strongly opposes the NPRM’s tentative view (at ¶20) that the “fair, equitable, and efficient distribution of radio service” standard of Section 307(b) of the Act, concepts of “*de facto* reallocation,” and concern about loss of service by NTSC viewers may be relevant to the question of NTSC/DTV service area replication.

12. In the Report and Order in BC Docket No. 82-320 (Suburban Community Policy), 93 FCC 2d 436 (1983), recon. denied, 56 RR 2d 835 (1984), the Commission reviewed and

discarded three policies which had been developed to aid it in fulfilling its responsibilities under Section 307(b) of the Act – the Suburban Community Policy (for AM stations) and the Berwick doctrine and the de facto reallocation policy (for FM and TV stations). All three policies explored whether a new-station application or an existing station's proposed change in facilities was "really" motivated by a desire to serve some other larger community, instead of the station's community of license. The Commission correctly concluded that these policies were often invoked for anticompetitive purposes by competing local stations in the larger communities, that they had frustrated rather than furthered the goals of Section 307(b) by inhibiting the establishment or expansion of stations in small communities located near larger ones, and that the Commission could fulfill its Section 307(b) responsibilities through its principal community service contour coverage and main studio location rules.

13. Now, some 17 years later, the Commission appears poised in Paragraph 20 of the NPRM to revive its de facto reallocation concerns when examining DTV implementation applications in which the proposed DTV service area veers from the station's existing NTSC service area in the direction of some larger community. Simons urges that the Commission's 1983 logic is still fully applicable to today's concerns, and that the Commission should simply use its principal community coverage and main studio rules as a structural way of meeting its Section 307(b) DTV concerns without resorting to discredited policies and tests of "real purpose".

14. In making this recommendation, Simons recognizes that the Commission revived some de facto reallocation criteria in Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990). There, however, the Commission developed a rulemaking procedure for amending the



FM and TV Tables of Allotments so that a licensee or permittee proposing to amend the Table to change its station's community of license can do so without triggering an opportunity for other interested parties to file applications for the new allotment. Simons maintains that there is a clear factual, procedural, and legal distinction between a DTV implementation application, which extends the licensee's DTV service area toward a larger community other than its community of license, and a petition to amend the TV Table in which a licensee proposes to have its frequency reallocated to another community in or near a larger Urbanized Area. To apply de facto reallocation criteria to DTV implementation applications that satisfy the Commission's principal community contour and main studio rules and do not propose to change the licensee's community of license would clearly represent a retreat to pre-1983 Commission policy. Another part of the subject NPRM specifically raises questions about the correct strength of a DTV licensee's principal community service contour. Simons submits that the Commission's Section 307(b) concerns should be resolved by that type of structural solution – just as the Commission did in 1983.

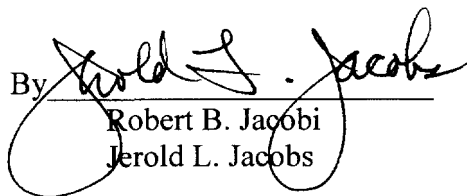
15. Similarly, Simons urges the Commission not to add loss of potential NTSC audiences as a matter for analysis in processing DTV implementation applications. In the Year 2000, given extensive cable penetration nationwide, direct broadcast satellite services, and the availability of TV translator stations for fill-in purposes, licensees trying to maximize their DTV service areas should not be hobbled by traditional “areas and populations” comparative coverage analyses. These analyses had their genesis and life force in: (a) historical comparative broadcast hearing cases involving competing new-station applications for the same frequency; (c) applications in which the Commission weighs increased and decreased interference resulting from modifying existing stations' facilities; and (c) de facto reallocation cases in which the

Commission considers loss of service as a factor in deciding whether to reallocate a frequency to a different community. No such application comparison, interference, or frequency reallocation considerations are at issue in DTV implementation applications that are fully consistent with Sections 73.622 and 73.623 of the Rules. Hence, Simons urges that the Commission should not apply loss of service considerations to DTV implementation applications.

WHEREFORE, in light of the foregoing, Mike Simons respectfully requests that the Commission should adopt a Report and Order in this proceeding consistent with these Comments.

Respectfully submitted,

MIKE SIMONS

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